

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN C. RICE,

Plaintiff/Counter-Defendant-
Appellant/Cross-Appellee,

v

THELMA M. RICE,

Defendant/Counter-Plaintiff-
Appellee/Cross-Appellant.

UNPUBLISHED

January 18, 2005

No. 249072

Genesee Circuit Court

LC No. 01-229954-DO

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's distribution of the marital estate and its award of alimony set forth in the divorce decree. We affirm in part, reverse in part and remand in part.

Plaintiff first argues that the trial court erred when it found that real property located at 7246 Rogers Street was marital property to be divided as part of the marital estate. We disagree. When deciding a divorce case, the trial court must make findings of fact and dispositional rulings. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). On appeal, this Court must uphold the trial court's factual findings unless they are clearly erroneous. *Id.* A finding of fact is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made. *Draggou v Draggou*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the trial court's findings of fact are upheld, this court must decide whether its dispositional ruling was fair and equitable in light of those facts. *Id.* A dispositional ruling should be affirmed unless this Court is left with the firm conviction that it was inequitable. *Id.* at 430.

Plaintiff first asserts that the property in question belonged to his parents at the time of the trial or at the time of entry of the judgment of divorce. Plaintiff acknowledges that the property of third parties may be included in a marital estate if the court finds either that the third party conspired with one of the parties to deprive the other party of his or her share of the marital estate, or that one of the parties had made a fraudulent transfer in order to deprive the other party of his or her share. But because the trial court made no such finding, plaintiff asserts the court erred by including this property in the marital estate.

It is true that plaintiff's mother and sister gave him this property as a gift and that it was deeded in plaintiff's name alone. It is also true that after the parties separated, but before trial,

plaintiff conveyed by his signature alone the property to his parents by quitclaim deed. But plaintiff completely ignores the fact that when mother and sister conveyed the property to him, defendant, as his wife, obtained a dower interest in the property, which interest defendant never conveyed or assigned to anyone else.

Michigan law provides that a wife has a dower interest in all land of which her husband was seized of an inheritable estate at any time during the marriage. MCL 558.1; *In re Stroh Estate*, 151 Mich App 513, 516; 392 NW2d 192 (1986). Plaintiff's mother and sister deeded the property to plaintiff during the parties' marriage. Therefore, regardless of the fact that only plaintiff's name was listed on the deed when the property was conveyed, defendant obtained a dower interest in the property. Thus, plaintiff could not convey this property to a third party without first obtaining defendant's signature on the instrument of conveyance because "[a] husband may not bargain away his wife's dower interest." *Slater Management v Nash*, 212 Mich App 30, 32; 536 NW2d 843 (1995). The statute of frauds requires that both a seller and his wife with a dower interest sign a conveyance in order for that conveyance to be valid, and the absence of the wife's signature renders the conveyance ineffective. *Id.* at 32-33. Here, defendant never signed any document conveying her interest in the Rogers Street property to anyone; therefore, she retained her dower interest. Accordingly, the quitclaim deed signed only by plaintiff purporting to convey this property to plaintiff's parents was ineffective.

Plaintiff also argues that the Rogers Street property was his separate property, given to him alone as a gift. Accordingly, even though this property belonged to him for a period during the parties' marriage, it was his property alone and not subject to inclusion in the marital estate. Again, plaintiff ignores that fact that upon conveyance of the property to him, regardless of whether her name was included on the deed, by law defendant acquired a dower interest in the property. MCL 558.1; *In re Stroh Estate, supra* at 516. As a result, the trial court properly included this property in the marital estate and properly concluded that defendant had an interest in the property. We believe, however, from our review of the record, that the trial court erred in its valuation of the property and then also in its calculation of the amount of defendant's interest. The record establishes that the Rogers home was constructed after the parties separated and that plaintiff's father, Charles Rice, financed the construction by borrowing money against his own home. Charles Rice testified that he had secured the construction loan by allowing the lender to place a lien on his own residence. Defendant concedes that she made no contributions to the property. There seems to be no question that plaintiff's father provided the money used to construct the home on Rogers Street. From this evidence we conclude that the trial court erred by accepting the appraiser's value of the property with the home at \$115,000 when the value of the gifted land without the house was \$5,000 at the time plaintiff received it and \$15,000 at the time of trial. Thus, from the record we conclude that the marital estate was enhanced by \$15,000, the value of the land alone at the time of trial; consequently, defendant would only be entitled to one half, or \$7,500.

Plaintiff next argues that the trial court erred in ordering plaintiff to pay alimony. Again, we disagree. Whether to award spousal support is in the trial court's discretion, and this Court reviews a trial court's award for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). On appeal, we review the trial court's findings of fact regarding spousal support for clear error. *Id.* "The findings are presumptively correct, and the burden is on the appellant to show clear error." *Id.*, citing *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207

(1990). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.* at 804-805. If the trial court's findings of fact are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Gates, supra* at 433. A trial court's decision regarding spousal support must be affirmed unless this Court is firmly convinced that the award was inequitable. *Id.*

The trial court ordered plaintiff to pay defendant \$100 a week in spousal support for eighteen months because it was equitable. In so doing, the court made specific findings of fact. These factual findings were not clearly erroneous; they were substantially supported by the parties' testimony.

Although the trial court's findings of fact are at times contradictory, the findings upon which the court based its award of alimony were internally consistent and were not clearly erroneous. Accordingly, while some of the court's findings between the two parts of its opinion are contradictory, we do not believe that this provides a reason to disturb its award of alimony.

We also find that the trial court's dispositional ruling was fair and equitable in light of its factual findings. Evidence was presented at trial that while plaintiff received disability payments each month from the Veteran's Administration, he was still able to work in home or building construction, and that he did work in this field regularly and expected to make a profit in 2002. At the same time, defendant testified that she was unemployed and disabled, had no health insurance, received no unemployment or workers compensation payments, lacked job skills, and had been unable to find a job. Under these circumstances, the court's award of alimony was fair and equitable.

Plaintiff also argues that trial court bias resulting in actual prejudice mandates a new trial. But a party must move to disqualify a judge in the trial court within fourteen days after learning the bases for disqualification. MCR 2.003. This exclusive procedure must be followed. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). Unless unapparent circumstances require sua sponte recusal, a party waives appellate review by not timely moving in the trial court to disqualify the judge. *Evans & Luptak v Obolensky*, 194 Mich App 708, 715; 487 NW2d 521 (1992); *People v Gibson (On Remand)*, 90 Mich App 792, 796; 282 NW2d 483 (1979). Here, plaintiff was aware of the alleged disqualifying circumstances and failed to timely move to disqualify the judge in the trial court. Accordingly, plaintiff has waived this issue for appellate review.

In a cross-appeal, defendant argues that the trial court abused its discretion by denying defendant's request for attorney fees. We agree. This Court reviews a trial court's grant or denial of attorney fees for an abuse of discretion. *Gates, supra* at 437-438. An abuse of discretion will be found only if the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id.* at 438, citing *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994), and *Spalding v Spaulding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit. *Gates, supra* at 438. But a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Id.* This

is particularly the case when the other party enjoys a comparatively substantial income advantage over the party seeking attorney fees. *Id.*

Here, defendant introduced evidence that she was disabled, currently unemployed, received no unemployment benefits or worker's compensation, and depended on her mother for housing and sustenance. Further, the trial court indicated it believed this evidence as manifested in its decision to award alimony. Defendant also presented evidence that her trial counsel's rate was \$200 an hour. Under these circumstances, defendant would have to invade assets awarded to her in the judgment of divorce that were clearly necessary for her support in order to pay her attorney fees.

Moreover, defendant introduced evidence that plaintiff had worked throughout the divorce proceeding as a builder and subcontractor and that he earned approximately \$21,000 in 2002. In light of this evidence, plaintiff certainly enjoyed a comparatively substantial income advantage over defendant. For both of these reasons, we find that the trial court abused its discretion when it denied defendant's request for attorney fees. Thus, we reverse the trial court's denial of that request and remand this case to the trial court to calculate and award defendant the proper amount of attorney fees.

We affirm in part, reverse in part and remand this case to the trial court for further proceedings consistent with this opinion and for entry of an appropriate award of attorney fees to defendant. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen Fort Hood